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6 **Attorney for Defendant:**
7 **KENNETH MARTIN KYLE**

8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11

12 **UNITED STATES OF AMERICA**)
13 **Plaintiff,**) **CASE NO. CR 10 0245 JSW**
14 **- against -**) **NOTICE OF MOTION AND MOTION**
15 **KENNETH MARTIN KYLE**) **TO SUPPRESS EVIDENCE**
16 **Defendant.**) **DATE: JANUARY 19, 2011**
17 **COURTROOM 11, 19th FLOOR**
18

19 **DOCUMENTS ATTACHED:**
20

- 21 1. Memorandum of Points and Authorities
22 2. Declaration of David Michael Bigeleisen
23 3. Exhibit 1
24

25 **TO: MELINDA HAAG, OWEN MARTIKAN,**
26 **OFFICE OF THE UNITED STATES ATTORNEY**
27

28 **Comes now the defendant, Kenneth Kyle and moves to suppress the following**
evidence:

Notice of Motion and Motion to Suppress Evidence

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1. Results of the search of Mr. Kyle's cell phone at the airport on March 15, 2010
2. Results of e-mail searches at the airport on March 15, 2010
3. The results of searches of Mr. Kyle's notebook computer after it was taken from the airport
4. The fruits of those searches, including, but not limited to:
 - interviews with Tessa Van Vlerah and the information gained from those interviews
 - photographs of the child
 - other information gathered from the investigation in Missouri
 - information gathered from the search of Mr. Kyle's apartment on April 10, 2010, as well as the fruits thereof

This motion is made on the ground that the search by government agents of Mr. Kyle's person and possessions, which occurred on March 15, 2010 was in violation of the Fourth Amendment of the Constitution of the United States of America. This motion is based on this notice, the attached memorandum of points and authorities, the attached declaration of David Michael Bigeleisen, as well as such other evidence as will be adduced at the hearing on this motion.

This motion will be heard in Courtroom 11, on the nineteenth floor of the United States Courthouse, located at 450 Golden Gate Avenue, San Francisco, California on January 19, 2011 at 9:00 A.M..

Dated: November 24, 2010


DAVID MICHAEL BIGELEISEN
Attorney for Defendant:
KENNETH MARTIN KYLE

Notice of Motion and Motion to Suppress Evidence

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
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12 **UNITED STATES OF AMERICA**)
13 **Plaintiff,**) **CASE NO. CR 10 0245 JSW**
14 **- against -**) **MEMORANDUM OF POINTS AND**
15 **KENNETH MARTIN KYLE**) **AUTHORITIES IN SUPPORT OF**
16 **Defendant.**) **MOTION TO SUPPRESS EVIDENCE**
17 **DATE: JANUARY 19, 2011**
18 **TIME: 9:00 A.M.**
19 **COURTROOM 11, 19th FLOOR**

20 **DOCUMENTS ATTACHED:**

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24 **FACTUAL BACKGROUND**

25 In late 2009 or early 2010, the FBI began an internet investigation of Mr. Kyle.
26 The information which the FBI had gathered was forwarded to the San Francisco Police
27 Department. The San Francisco police obtained a warrant to search Mr. Kyle's home.

28 *Memorandum of Points and Authorities in Support of Motion to Suppress Evidence*

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1 On March 10, 2010, the San Francisco Police Department searched Mr. Kyle's
2 apartment. That search resulted in a seizure of several notebook computers, and
3 additional information. The government maintains that the computer information
4 contained evidence of child pornography and distribution of child pornography.

5 The San Francisco Police Department learned that Mr. Kyle was to return to the
6 United States from Europe in March 15, 2010. They alerted the federal authorities at
7 the San Francisco International Airport.

8 Customs officials detained Mr. Kyle at the airport. They searched his notebook
9 computer for contraband, and they seized it.

10 They did much more. Federal officials searched Mr. Kyle's e-mails in his
11 computer. They also searched his cell phone for messages, text messages, and phone
12 numbers. They were not searching for contraband. They were investigating further in
13 pursuit of a criminal investigation.

14 They removed Mr. Kyle's notebook computer and his cell phone from the airport.
15 They waited six days. On March 21, 2010, Annalisa Nogales searched the cell phone,
16 not seeking contraband, but seeking further information to conduct a criminal
17 investigation. ICE agents also conducted a further search of Mr. Kyle's computer.

18 ICE agent Annalisa Nogales conducted this search in order to investigate possible
19 further cases of child pornography or child abuse. But she could have presented the
20 matter to a magistrate and requested a warrant quite easily. She did not.

21 The federal authorities travelled to Missouri. There they met and interviewed
22 Tessa Van Vlerah at least three times. Two of these interviews were recorded.

23 Following the Missouri investigation, federal authorities obtained a warrant to
24 search Mr. Kyle's apartment once again. They found evidence of travel, and financial
25 documents.

26 *Memorandum of Points and Authorities in Support of Motion to Suppress Evidence*
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1 The federal authorities also found a digital camera, further computer information
2 and sex toys.

3 All of the information which the authorities gathered upon the search of
4 Mr. Kyle's cell phone and e-mails, and thereafter was on furtherance of a criminal
5 investigation. It was not related to an administrative border search. It was unlawful,
6 and yielded fruit of the poisonous tree.

7
8 ITEMS TO BE SUPPRESSED

- 9 1. Results of the search of Mr. Kyle's cell phone at the airport on March 15,
10 2010
- 11 2. Results of e-mail searches at the airport on March 15, 2010
- 12 3. The results of searches of Mr. Kyle's notebook computer after it was taken
13 from the airport
- 14 4. The fruits of those searches, including, but not limited to:
- 15 – interviews with Tessa Van Vlerah and the information gained from
16 those interviews
 - 17 – photographs of the child
 - 18 – other information gathered from the investigation in Missouri
 - 19 – information gathered from the search of Mr. Kyle's apartment on April
20 10, 2010, as well as the fruits thereof

21 THE AUTHORITY OF THE GOVERNMENT TO CONDUCT AN
22 ADMINISTRATIVE SEARCH AT THE BORDER IS LIMITED TO SEIZURE OF
23 CONTRABAND AND EXCLUSION OF THOSE NOT AUTHORIZED TO ENTER

24 On March 15, 2010 Mr. Kyle entered the United States at San Francisco
25 International Airport from Europe. Members of the San Francisco Police Department
26 had alerted ICE agents and BCE agents that Mr. Kyle might have contraband on his

27 *Memorandum of Points and Authorities in Support of Motion to Suppress Evidence*

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1 computer. Federal agents Vanessa Golden, Mejia, Petersen, Gould and Shan took
2 Mr. Kyle aside, and began to search Mr. Kyle's computer for child pornography.

3 But the agents did much more, they searched his computer and cell phone for e-
4 mails, text messages, and records of telephone calls. This portion of the search was not
5 directed to detecting contraband. It was done in furtherance of an ongoing criminal
6 investigation. Thus, it was beyond the scope of a border search. It was forbidden.

7 The purpose of a border search is to regulate the collection of articles, and to
8 prevent the introduction of contraband into the country. United States v. Flores-
9 Montano 541 U.S. 149 (2004), at pp 152, 153. Please see also United States v. Alfonso
10 759 F.2d 728 (9th Cir. 1985) at p. 733, United States v. Ramsey 431 U.S. 606 (1977)
11 at p 618.

12 These cases describe the scope if an administrative customs search by the
13 government at the border. The scope is not unlimited.

14 In United States v. Davis 482 F. 2d 893 (9th Cir. 1973) the government conducted
15 an administrative search of Mr. Davis' luggage as he was about to board an airplane.
16 The search was conducted as part of a regulatory scheme to insure air travel safety. The
17 Ninth Circuit held searches as part of a general regulatory scheme may be permitted at
18 the border if they are in furtherance of an administrative purpose. But if the purpose of
19 the search is in furtherance of a criminal investigation, then it violates the Fourth
20 Amendment. The Court went on to say that the "... search must be limited in its
21 intrusiveness as is consisted with the administrative needs that justify it." There is an
22 obvious danger that screening passengers and their luggage for weapons and explosives
23 will be subverted into a general search for evidence of a crime. If this occurs, the courts
24 will exclude the evidence obtained. (emphasis added.)

25 / / /

26
27 *Memorandum of Points and Authorities in Support of Motion to Suppress Evidence*
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1 There was more than ample time to get a warrant.

2 The cases of United States v. Arnold 533 F.3d 1003 (9th Cir. 2008), United States
3 v. Romm 455 F.3d 990 (9th Cir. 2005) and United States v. Alfonso 759 F.2d 728 (9th
4 Cir. 1985) are distinguishable from Mr. Kyle's case.

5 In Alfonso, the local police and the United States government had already
6 instituted the investigation before they searched the vessel Ciudad de Santa Maria.
7 The search of the ship was deemed to be a border search, and the search was to
8 intercept contraband, to wit: cocaine.

9 In Arnold, the search by customs authorities was limited to a search fo Mr.
10 Arnold's laptop computer. The agents were looking for child pornography, and that is
11 exactly what they found. They did not look further to find evidence of other crimes.
12 They did not search e-mails or text messages.

13 Similarly, in Romm the search at the border was for child pornography and that
14 is exactly what the government found. The search did not go beyond a search for
15 contraband. And, of course, in Romm the defendant consented to the search. See
16 p 994.

17 Under Wong Sun v. United States 371 U.S. 471 (1963) the fruits of the poisonous
18 tree are also tainted. Thus, all which followed the illegal search fo Mr. Kyle's e-mails
19 and cell phone must be suppressed.

21 CONCLUSION

22 The authority of the government to search for contraband or illegal aliens at the
23 border is very broad. But it is not unlimited. The authority of the government to search
24 at the border is governed by the purpose of the search, and the need for the search.

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26 ///

27 *Memorandum of Points and Authorities in Support of Motion to Suppress Evidence*

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1 When the scope of the government's search exceeds the need to detect contraband
2 or aliens, then the scope of the search exceeds the border exception to the Fourth
3 Amendment. In this case, government conduct went far beyond a permissible border
4 search, in place, time, and scope. As such, it is illegal.

5 The results of the search of Mr. Kyle's cell phone, e-mails, computer, and all
6 which followed those searches must be suppressed.

7
8 Dated: November 24, 2010


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10 DAVID MICHAEL BIGELEISEN
11 Attorney for Defendant:
12 KENNETH MARTIN KYLE
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA)	CASE NO. CR 10 0245 JSW
Plaintiff,)	
)	DECLARATION OF DAVID
)	MICHAEL BIGELEISEN IN SUPPORT
- against -)	OF MOTION TO SUPPRESS
)	EVIDENCE
KENNETH MARTIN KYLE)	DATE: JANUARY 19, 2011
)	TIME: 9:00 A.M.
Defendant.)	COURTROOM 11, 19 th FLOOR

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1. Notice of Motion
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I, David Michael Bigeleisen, declare and say:

1. I am the attorney for Kenneth Kyle in this matter.
2. Mr. Kyle was stopped at San Francisco International Airport on March 15, 2010. ICE agents searched his notebook computer. They also searched

Declaration of David Michael Bigeleisen in Support of Motion to Suppress Evidence

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1 conducted a search pursuant to an ongoing criminal investigation. I am
2 informed and believe that the things contained in this paragraph based on
3 the reports provided by the government, and statements made by ICE
4 agent Annalisa Nogales.

5
6 3. ICE agents used the information that they found in Mr. Kyle's cell phone
7 to identify Tessa Van Vlerah. They travelled to Missouri where they
8 interviewed Ms. Van Vlerah. With the information which they gathered,
9 federal agents applied for warrant to search Mr. Kyle's apartment once
10 again. There they found travel documents, financial records, a camera and
11 sex toys. I am informed and believe that the items in the paragraph are
12 truly based on the reports already provided by the government in this case.

13
14 4. Attached as Exhibit 1 is the affidavit of Annalisa Nogales in support of the
15 warrant for the search of Mr. Kyle's residence. It is dated April 14, 2010.
16 Mr. Kyle requests the Court to take judicial notice of Exhibit 1.

17 I declare under penalty of perjury pursuant to the laws of the State of California
18 that the foregoing is true and correct. Executed at San Francisco, California this 24th
19 day of November, 2010.

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23 DAVID MICHAEL BIGELEISEN
24 Attorney for Defendant:
25 KENNETH MARTIN KYLE
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